ALLIED GRANITE MARBLE INDUSTRIES SDN BHD

v.

CHIN FOONG HOLDINGS SDN BHD & ORS

HIGH COURT MALAYA JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-246-1996]
13 MARCH 1999

CIVIL PROCEDURE: *Appeal - Extension of time to file leave to appeal and notice of appeal - Whether circumstances warranted court's discretion in favour of applicants*

CONTRACT: *Guarantee - Guarantee provided by director of company - Director resigned from company - Whether director still liable under guarantee*

The 2nd and 3rd defendants were guarantors for a sum of money that the 1st defendant owed to the plaintiff. The 1st defendant wound up and the plaintiff successfully obtained default judgments against the 2nd and 3rd defendants. The default judgments were based on the writ of summons which was served by way of substituted service, *ie*, posting and advertisement in the STAR newspaper. The 2nd and 3rd defendants jointly applied for stay and the setting aside of the default judgments. The Senior Assistant Registrar ('SAR') dismissed the said joint application.

In this instance, the 2nd and 3rd defendants, in encls. 29 and 36 respectively, applied for leave for extension of time to appeal against the decision of the SAR and leave to file their notices of appeal. They alleged that the delay in filing their notices of appeal was due to lack of funds. Against this, the plaintiff claimed that the delay had prejudiced the rights and interests of the plaintiff and that financial problem was not an excuse.

Apart from the above, both the 2nd and 3rd defendants deposed that they were educated in Chinese schools and that they did not read English newspapers. As such, they had no knowledge of the advertisement in regard to the service of the writ of summons by way of a substituted service. Further, the 2nd defendant deposed that as he had resigned as the managing director of the 1st defendant, he could not be held liable for its debt.

Held:

[1] There were apparent inconsistencies between the affidavits and the statement of defence of the 2nd and 3rd defendants. There was also inordinate delay in filing encls. 29 and 36.

[1a] Four factors must be taken into account in deciding whether to grant an extension of time to file a notice of appeal: (i) the length of the delay; (ii) the reasons for the delay; (iii) chances of appeal succeeding if time for appealing is extended; and (iv) the degree of prejudice that the opposite party may experience if the application is granted. The court also has the discretion to set aside an irregular judgment despite long delay.

[1b] The default judgments herein were regularly obtained. In the application to set aside the default judgments before the SAR, the reasons given for the delay were unintended and not deliberate. Nothing was said about lack of funds. But in encls. 29 and 36 herein, the reasons given for the delay were mainly confined to lack of funds.

[1c] When the notices of demand were issued to the 2nd and 3rd defendants, both of them already knew that the plaintiff was claiming the sum of RM316,949.23. Both of them also knew that the plaintiff's claim against them was grounded on the basis that they stood as guarantors. In fact, the 3rd defendant had given additional security in the form of four cheques which eventually proved worthless. The defence of duress raised by him on the basis that he was forced to issue those cheques was merely to hoodwink this court. There was no actual violence or a threat of violence exerted upon the 3rd defendant by the plaintiff.

[3] There was no requirement in law that a person who provides a guarantee for a company must be a director of that particular company. A guarantee should be treated reasonably after taking the surrounding circumstances into consideration.

[4] A guarantee is a legally enforceable promise whereby the guarantor undertakes to answer to the creditor for the present or future liability of a third party, *ie*, the debtor, in the event of a default by the debtor. A guarantee imposes a secondary or contingent liability on the guarantor. Being guarantors, the 2nd and 3rd defendants must be held accountable for the debt of the 1st defendant.

[5] Evidence showed that the 2nd and 3rd defendants were conversant in the English language and they could read as well as write the language. There was "no relevant evidential material" for the court to exercise discretion in favour of them.

[Encls. 29 & 36 dismissed with costs.]

For the plaintiff - Goh Mey Foon; M/s Leng & Co
For the 2nd defendant - KB Rajah; M/s KB Rajah & Co
For the 3rd defendant - Abdul Razak Ahmad; M/s Abdul Razak Ahmad & Assocs

Case(s) referred to:
Atlee v. Backhouse [1838] 3 M & W 633 ***(refd)***
Blyth v. Fladgate [1891] 1 Ch 337 ***(refd)***
Cf Ware and De Freville Ltd v. Motor Trade Association [1921] 3 KB 40 ***(refd)***
Cheviot Industries (Malaysia) Sdn Bhd v. Lean Hup Brothers Co (Sued as a firm) [1989] 1 CLJ 909 ***(refd)***
Chin Nam Bee Development Sdn Bhd v. Tai Kim Choo [1988] 2 MLJ 117 ***(refd)***
C Paul D'Cruz v. Chow Tai Yow & Sons Sdn Bhd [1998] 4 CLJ Supp 389 ***(refd)***
Dato Wong Gek Meng v. Pathmanathan Mylvaganam & Ors [1998] 5 MLJ 560 ***(refd)***
Friedeberg-Seely v. Klass [1957] 101 Sol Jo 275 ***(refd)***
Malaysian French Bank Bhd v. Abdullah Mohd Yusof & Ors [1991] 2 MLJ 475 ***(refd)***
Miles v. New Zealand Alford Estate Co [1886] 32 Ch D 266 ***(refd)***
Mohd Fariq Subramaniam v. Naza Motor Trading Sdn Bhd [1997] 3 CLJ Supp 249 ***(refd)***
Lloyds Bank Ltd v. Bundy [1975] QB 326 ***(refd)***
Kendall v. Hamilton [1879] 4 App Cas 504 ***(refd)***
Perlis Plantations Bhd v. Mohammad Abdullah Ang [1988] 1 CLJ 670 ***(refd)***
Pao On v. Lau Yiu Long [1979] 3 All ER 65 ***(refd)***
Rechik Kadir & Anor v. Mohamed Shah Senusi [1977] 1 CLJ Supp 508 ***(refd)***
Revici v. Prentice Hall Incorporated And Others [1969] 1 All ER 772 ***(refd)***
Soh Keng Hian v. American International Assurance Co Ltd [1996] 1 MLJ 191 ***(refd)***
Tan Chai Heng v. Yeo Seng Choon [1981] 1 MLJ 271 ***(refd)***
Teck Guan Trading Sdn Bhd v. Hydrotek Engineering (S) Sdn Bhd [1996] 4 MLJ 331 ***(refd)***
Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 ***(refd)***
White & Anor v. Tyndall & Ors [1888] 13 App Cas 263 ***(refd)***
Yogananthy AS Thambaiya v. Idris Osman [1997] 5 CLJ 705 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 15, 73, 80, 82, 84, 91
Rules of the High Court 1980, O. 56 r. 1(3)

Reported by Kavitha Gunasegaran

JUDGMENT

Abdul Malik Ishak J:

Introduction

Miss Goh Mey Foon acted for the plaintiff while Mr. KB Rajah acted for the second defendant by the name of Yong Koh Tat. The third defendant by the name of Yong Kah Tack was represented by Mr. Abdul Razak Ahmad. The

first defendant who had since been wound up was unrepresented. There were two enclosures for adjudication and the parties agreed that these two enclosures be heard together. For these reasons, encls. 29 and 36 were heard simultaneously.

Enclosure 29

This was an application by way of a summons-in-chambers filed by the second defendant on 26 October 1998 for the following prayers:

(a) that the second defendant be given leave for extension of time to appeal against the decision of the SAR dated 15 July 1998 that was handed down in this action:

(b) that the second defendant be given leave to file his notice of appeal within five days from the date of this order;

(c) that the costs of this application be costs in the cause; and

(d) such further order and/or other relief deem fit by this court.

Enclosure 29 was supported by an affidavit of the second defendant that was affirmed on 23 October 1998 and filed on 26 October 1998 as seen in encl. 28. In that affidavit, the second defendant deposed to matters within his knowledge save as otherwise stated. The second defendant referred to the judgment in default of appearance dated 29 November 1997 and the affidavit of substituted service by Md Noor Azam bin Ahamad that was affirmed on 27 November 1997 and the second defendant deposed that he had no knowledge of the advertisement on 15 November 1997 in the STAR newspaper because he did not read the English newspaper. The second defendant deposed that he studied up to Form 2 in the Foon Yew Chinese Secondary School in Johor Bahru and ended his studies in 1964. He deposed that he did not have many English speaking friends who could have told him of the said advertisement. He then referred to the writ of summons and the statement of claim in the present suit and he said that based on the plaintiff's claim against him, he was said to be, at the material time, a mere shareholder and the managing director of the first defendant, namely Chin Foong Holdings Sdn Bhd and according to the second defendant this was not true. The second defendant deposed that he had resigned as a director of the first defendant on 5 January 1993 and ceased being involved in the administration of the first defendant from thereon. The second defendant then referred to the writ of summons and the order dated 15 July 1998 by the SAR and he deposed that a close look at the title of these documents revealed various differences and he was advised and he verily believed that the plaintiff cannot make any amendments without the leave of the court and there was no such application to amend advanced by the plaintiff. The second defendant continued to depose

and he said that he only came to know of the judgment in default of appearance dated 29 November 1997 when a bankruptcy notice was served on him at No. 71, Jalan Serampang, Taman Sri Tebrau, 80050 Johor Bahru – his residence. He deposed that when he gave instructions to his former solicitors Messrs Abdul Razak Ahmad & Associates, he was in a state of confusion and shock. He deposed that although he had terminated his services as a director of the first defendant on 5 January 1993 he was informed by the company secretary that the first defendant was wound up on 4 April 1996 and provisional liquidators were appointed on the same date. He was then advised and he verily believed that this meant that the plaintiff would have to file its claim, if any, against the first defendant through the provisional liquidators who would meet all the creditors of the first defendant and after taking the relevant accounts, determine if there was any money left for distribution to the said creditors. The second defendant further deposed that a perusal of the winding up order revealed that it was dated 4 April 1996 whilst the writ of summons was dated 11 December 1996 and this meant that at the time of the issuance of the said writ the directors, servants and/or agents of the first defendant had no right whatsoever to administer the said company. Only the provisional liquidators had the power to administer the said company. The second defendant reiterated that he did not at any time give any undertaking to the plaintiff either orally or in writing. The second defendant too reiterated that the plaintiff had no right to maintain the present action against the first defendant or himself. The second defendant then explained that he made this application late as he had financial problems and as such he could not afford the fees required by the various solicitors which he saw. The second defendant was advised and he verily believed that he had merits in his defence to the claim against him by the plaintiff. The second defendant too verily believed that the plaintiff would not be prejudiced in any way in the event his application was granted. But according to the second defendant, he would suffer irreparable damage in the event the application in encl. 29 was not granted.

Lim Seng Cheong ('Lim'), a Singaporean with an address at Lot 3271, Batu 24 Jalan Air Hitam, 81000 Kulai, Johor, affirmed an affidavit in reply in his capacity as a director of the plaintiff and having authority to depose the affidavit in reply for the plaintiff as reflected in encl. 31 which was affirmed on 4 November 1998 and filed on the next day. Lim deposed encl. 31 according to his own personal knowledge and also based on the records of the plaintiff. Lim deposed that the second defendant wanted to appeal against the decision of the SAR that was handed down on 15 July 1998 but the second defendant failed to file the notice of appeal within the period of five days from 15 July 1998 and calculation-wise the notice of appeal should be filed

on or before 20 July 1998. Instead of being prompt, it was deposed that the second defendant took approximately three months, calculated from 21 July 1998 to 23 October 1998 (it should be 26 October 1998) to file the application in encl. 29. That delay was said to have prejudiced the rights and the interests of the plaintiff. Lim deposed that the plaintiff was advised and verily believed that paras. 3 to 14 of the affidavit in encl. 28 were not related to encl. 29. But all the same, without prejudice, Lim deposed that he would like to respond and this was what he said:

(1) He was advised by his counsel and he verily believed that the service of the writ of summons on the second defendant through an advertisement in the STAR newspaper was in compliance with the order of substituted service dated 16 October 1997 that was granted by the SAR and because of that, the service was considered appropriate. Lim then referred to the affidavit without service of Arzemi bin Abdul Rahman that was affirmed on 26 February 1997 and the affidavit of service of Md Noor Azam bin Ahamad that was affirmed on 27 November 1997.

(2) He denied that the basis of the plaintiff's claim against the second defendant was because the latter was a shareholder and a director of the first defendant. He categorically said that the second defendant had orally guaranteed to pay the debt of the first defendant. For this reason, it was totally irrelevant that the second defendant had resigned his portfolio as a director of the first defendant on 5 January 1993.

(3) He said that the second defendant was giving fresh reasons after his first attempt at setting aside the judgment in default dated 29 November 1997 failed. It was said that the reason that the second defendant gave to the effect that the second defendant was confused was a reason that cannot be accepted.

(4) He said that notwithstanding the fact that the first defendant had been wound up, the liability of the second defendant as a guarantor to the debt incurred by the first defendant was still in existence and consequently he denied paras. 6 and 7 of the second defendant's affidavit in encl. 28.

(5) He denied paras. 8, 9, 10 and 11 of encl. 28 and repeated his averments in his current affidavit in reply in encl. 31. He also denied paras. 12 and 13 of encl. 28 and stressed that the second defendant had orally promised to guarantee payment of the first defendant's debt. He also denied para. 14 of encl. 28 and he said that the second defendant was only interested in avoiding payment under the judgment in default and the second defendant's application in encl. 29 was an attempt to delay payment. He stated that the plaintiff had since filed a creditor's petition

against the second defendant in bankruptcy proceedings no. 29-458-1998. He denied para. 15 of encl. 28 and he stated that financial problem was not a reason that can be accepted.

(6) In regard to the proposed statement of defence of the second defendant that was exhibited in encl. 28 and marked as exh. 'YKT 3', he repeated his affidavit in reply that was affirmed on 1 July 1998 and marked as encl. 23 particularly para. 9(a) to (e) thereof.

For these reasons, Lim prayed that the second defendant's application in encl. 29 be dismissed with costs.

The second defendant took exception to encl. 29 and he responded by filing a further affidavit on 18 November 1998 which he affirmed on 14 November 1998 and this further affidavit can be seen in encl. 33. The second defendant stated that he deposed to matters within his own knowledge save as otherwise stated. He reiterated that he was unable to pay the necessary fees of the lawyers whom he saw and as a result he made his application rather late. He was advised and he verily believed that the contents of paras. 3 to 14 of encl. 28 were important as it showed the actual situation in this civil suit. He reiterated that he did not know about the action instituted against him until he received the bankruptcy notice at his house address. He reiterated that he did not at any time guarantee the payment orally or in writing. He was advised and he verily believed that since this was an issue disputed by both parties, the matter should be set down for trial to enable this court to reach a just decision. He reiterated that he did not give complete instructions to his former solicitors. He was advised and he verily believed that the matter of the first defendant being wound up should have been known to the plaintiff and this was not revealed to the court. He also said that other salient facts known by the plaintiff was not revealed to this court intentionally. He reiterated that he did not guarantee anything to the plaintiff. He said that he did not give a verbal undertaking to guarantee the debt of the first defendant He was advised and he verily believed that the plaintiff was instituting this claim against him for the debt incurred by the first defendant knowing fully well that the first defendant had been wound up. He categorically stated that the filing of the creditor's petition against him by the plaintiff was an attempt by the plaintiff to compel and coerce him to pay the debt of the first defendant which he did not owe. He was advised and he verily believed that in a case of setting aside a judgment in default, the party involved has to show merits. He deposed that to date the plaintiff had not shown irrefutable proof that he had no merits against the claim of the plaintiff. He stated that the plaintiff merely alleged that he orally guaranteed the payment of the debt of the first defendant and he had consistently denied a number of times. For these reasons, he – the second defendant, prayed for an order in terms of encl. 29.

Enclosure 36

The third defendant by way of this enclosure sought for the following prayers:

(i) that the third defendant be given leave for extension of time to appeal against the decision of the SAR dated 15 July 1998 in relation to this action;

(ii) that the third defendant be given leave to file his notice of appeal within a period of five days from the date of the order;

(iii) that the costs of this application be costs in the cause;

(iv) any other relief deem fit and reasonable by this court.

The third defendant affirmed an affidavit in encl. 35 on 17 November 1998 which was filed on the next day. He deposed that he affirmed the affidavit on the strength of his own knowledge and from the records and documents available in his possession. After referring to the writ of summons and the statement of claim together with the other relevant affidavits he forwarded straight to the crux of the problem. He referred to the judgment in default of appearance dated 29 November 1997 and the affidavit of service affirmed by Md Noor Azam bin Ahamad on 27 November 1997 and he continued to say that, at all material times, he had no knowledge of the advertisement that appeared in the STAR newspaper dated 15 November 1997 because he did not read newspapers in the English language. He deposed that he received his education in a Chinese school and he did not have acquaintances who were proficient in the English language. He too said that he was not told by anyone about this matter. He deposed that, at all material times, he was not the director of the first defendant and this fact was within the knowledge of the plaintiff and that he was forced to issue those cheques. He said that he only knew about the judgment in default of appearance dated 29 November 1997 when he was served with a notice of bankruptcy on 28 May 1998. He deposed that, at all material times, he was not a director of the first defendant and he was informed by the secretary of the first defendant that the latter had been wound up on 4 April 1996. In the circumstances, he was advised and he verily believed that the plaintiff should advance his claim against the first defendant through provisional liquidators who would weigh in a balance all the claims by the creditors of the first defendant and who would then divide and distribute the assets to all the creditors after the accounts were taken. He was also advised and he verily believed that the first defendant had been placed under the powers of the provisional liquidators when the writ of summons was filed on 11 December 1996 and for these reasons the plaintiff should claim against the first defendant through the provisional liquidators. He deposed that his failure to enter an appearance was because he had no knowledge in regard to

the advertisement and the writ of summons. He denied that he was the director of the first defendant and he said that he never gave any guarantee or oral promise or written promise to the plaintiff at all times. He explained that the delay in filing the application in encl. 36 was because of the financial difficulty which he was facing and the lawyers whom he had met refused to take his case since he was unable to pay their fees. He was advised and he verily believed that he had a meritable defence and a *prima facie* case in this action on the strength of the draft statement of defence which was exhibited and marked as 'YKT 111' in the joint affidavit of the second and third defendants in encl. 20. He believed that the interest of the plaintiff would not be jeorpadised if this court were to allow encl. 36. He said he would incur damages that could not be remedied if encl. 36 was rejected by this court. He implored this court to grant encl. 36.

Lim affirmed an affidavit in reply in encl. 40 in response to encl. 35. Enclosure 40 was affirmed by Lim on 30 November 1998 and it was filed on 1 December 1998. Lim deposed that the third defendant was not satisfied with the order of the SAR that was handed down on 15 July 1998 and the third defendant was interested in appealing against that decision but failed to file a notice of appeal within the span of five days that have been set aside under the Rules of the High Court 1980 ('RHC') and that would be on or before 22 July 1998. It was deposed that the third defendant took approximately four months (calculated from 23 July 1998 to 18 November 1998) to file the application in encl. 36. That delay was said to have prejudiced the rights and interests of the plaintiff. Lim deposed that the plaintiff was advised and verily believed that the averments by the third defendant in encl. 35 at paras. 3 to 11 were irrelevant because encl. 36 was an application by the third defendant to extend time to file the notice of appeal against the decision of the SAR and those averments were related to the application to set aside the judgment in default of appearance and, consequently, those averments should not have been ventilated in encl. 35. Lim deposed that the plaintiff was advised and verily believed that the service of the writ of summons on the third defendant through the advertisement in the STAR newspaper was in accordance with the order of substituted service dated 16 October 1997 that was given by the SAR. Thus, it was said that that was a good service. For this purpose, Lim referred to the affidavit of non-service of Arzemi bin Abdul Rahman that was affirmed on 26 February 1997 and the affidavit of service of Md Noor Azam bin Ahamad that was affirmed on 27 November 1997 as these affidavits were relevant and they have been filed accordingly. Lim further deposed that whether the third defendant was a director of the first plaintiff or not, was not relevant and the plaintiff denied that the third defendant was forced to issue those cheques. In fact, so it was deposed, the third defendant had orally guaranteed the payment of the debt

of the first defendant and to show the sincerity of the third defendant and also to serve as an additional security, the third defendant had issued those cheques. Lim deposed that even though the first defendant had been wound up, the liabilities of the third defendant as a guarantor for the debt of the first defendant and as a drawer to those cheques still persisted. Lim reiterated that the third defendant gave an oral undertaking to indemnify the debt of the first defendant. Lim stressed that financial problem was not a reason that can be accepted. For these reasons, Lim prayed that the application of the third defendant in encl. 36 be dismissed with costs.

Observations

It can be discerned that both the applications in encls. 29 and 36 were filed by the second defendant and the third defendant respectively for the same prayers. The affidavits supporting encls. 29 and 36 and the replies thereto were drafted in similar veins and they were interestingly laid out for this court to peruse and scrutinise. In its correct perspective, the scenario would be like this:

(1) **4 October 1996**

Notice of demand issued against the second defendant.

(2) **31 October 1996**

Notice of demand issued against the third defendant.

(3) Both the second and third defendants admitted receiving those notices and this can be seen in para. 7 of the first proposed statement of defence by the second and third defendants marked as exh. 'YKT 111' of encl. 20.

(4) 11 December 1996 – the writ of summons was issued. The addresses of both the second and the third defendants referred to in encl. 20 were said to be at no: 71, Jalan Serampang, Taman Sri Tebrau, 80050, Johor Bahru, Johore and this was also the address stated in the writ. The second defendant admitted staying at the same address as can be seen in the second proposed statement of defence of the second defendant exhibited and marked as exh. YKT 3 of encl. 28. The second defendant also admitted that the same address is his house and this blatant admission can be seen at para. 6 of encl. 28.

(5) **15 November 1997**

The writ of summons was served by substituted service; the service was by way of posting and advertisement in the STAR newspaper.

(6) **29 November 1997**

The plaintiff successfully obtained default judgments against the second and third defendants.

(7) **13 January 1998**

The plaintiff served the default judgments on the second and third defendants.

(8) **16 January 1998**

Messrs Abdul Razak Ahmad & Associates wrote and requested for the writ of summons as can be seen in exh. A of encl. 23. Thereafter nothing was done and the plaintiff proceeded to issue bankruptcy notices.

(9) **28 May 1998**

Bankruptcy notices served personally on the second and third defendants.

(10) **17 June 1998**

The second and third defendants filed summons in chambers for stay and setting aside the judgment in default as seen in encl. 21; the delay came to 6½ months from the date of the judgment in default and the reason given was this:

> Kami ingin menyatakan bahawa kegagalan kami memasukkan memorandum kehadiran dalam masa yang ditetapkan adalah tidak disengajakan.

(see para. 5 of encl. 20).

(11) **15 July 1998**

The SAR dismissed encl. 21 (this was the joint application of both the second and third defendants for stay and setting aside judgment in default) with costs. There was no appeal to the judge in chambers.

Five days from 15 July 1998 would be 20 July 1998 (O. 56 r. 1(3) of the RHC where "the notice must be issued within five days after the judgment, order or decision appealed against was given or made").

(12) **24 October 1998**

The plaintiff's solicitors received a notice of change of solicitors for the second defendant as seen in encl. 26 (Messrs K.B. Rajah & Co. took over from Messrs Abdul Razak Ahmad & Associates).

(13) **26 October 1998**

The second defendant filed summons in chambers in encl. 29 for leave to appeal.

There was a delay of approximately three months from the last date of filing the notice of appeal (from 20 July 1998 to 26 October 1998). The reason given can be seen at para. 15 of encl. 28:

> Saya terlewat membuat permohonan ini sebab saya menghadapi masalah kewangan dan beberapa peguamcara yang saya (berjumpa) tidak mengambil kes saya sebab saya tidak mampu membayar yurannya.

The translation reads as follows:

> I am making this application late as I had financial problems and as such I could not afford the fees required by the various solicitors whom I had seen.

(14) **18 November 1998**

The third defendant filed a summons in chambers for leave to appeal as seen in encl. 36.

There was a delay of approximately four months from the last date of filing the notice of appeal (from 20 July 1998 to 18 November 1998). The reason given can amply be seen at para. 12 of encl. 35:

> Saya ingin menyatakan bahawa kelewatan saya membuat permohonan ini adalah disebabkan oleh masalah kewangan yang dihadapi oleh saya dan peguamcara-peguamcara yang saya berjumpa enggan mengambil-alih kes saya kerana saya tidak mampu membayar yuran.

The translation reads as follows:

> I wish to state that the delay in making this application is due to the financial problems experienced by me and the lawyers whom I had met refused to handle my case because I could not afford to pay their fees.

Inconsistencies

The apparent inconsistencies between the affidavits and the proposed statement of defence, on the one hand, and the pronounced inconsistencies between the first proposed statement of defence of the second and third defendants with

that of the second proposed statement of defence of the second defendant, on the other hand, can never be doubted. Briefly, these inconsistencies may be itemised as follows:

(1)(a) In para. 1 of the first proposed statement of the second and third defendants as seen in exh. YKT 111 of encl. 20, there was an admission at para. 4 of the statement of claim to the effect that the second defendant was, at all material times, the shareholder cum managing director of the first defendant.

(b) In para. 4 of encl. 28, the second defendant claimed that he resigned as a managing director on 5 January 1993.

(2)(a) In para. 7 of the first proposed statement of defence of the second and third defendants as reflected in exh. YKT 111 of encl. 20, there was an admission that they received notices of demand from the plaintiff.

(b) In para. 10 of the second proposed statement of defence by the second defendant, there was denial of the receipt of the notice of demand.

(3) In para. 6 of encl. 28, it was averred as follows:

> Saya baru tahu mengenai penghakiman ingkar kehadiran bertarikh 29.11.1997 apabila Notis Bankrapan diserahkan kepada saya …..

(I just came to know of the judgment in default of appearance dated 29.11.1997 when the bankruptcy notice was served on me).

and in the same vein, para. 5 of encl. 35 was worded as follows:

> ….. saya hanya tahu tentang Penghakiman Ingkar Kehadiran yang bertarikh 29 November 1997 tersebut apabila sesalinan Notis Kebankrapan diserahkan kepada saya …….

(I only came to know about the judgment in default of appearance that was dated 29 November 1997 when a copy of the bankruptcy notice was served on me).

and these averments must be viewed in the context of the fact that the bankruptcy notices were served personally on 28 May 1998 on both the second and third defendants.

Delay And Other Related Issues

I have set out in some detail the chronological events behind the filing of encls. 29 and 36. Without a doubt there was inordinate delay in filing encls. 29 and 36. I repeat, the delay in filing encl. 29 was approximately three

months while the delay in filing encl. 36 was approximately four months. In *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 1 MLJ 191 CA, Gopal Sri Ram JCA delivering the judgment of the Court of Appeal at page 194 succinctly said:

> It is axiomatic that this court is seized of a wide discretion to extend time in proper and deserving cases. But, it is not an unprincipled discretion. There must be some relevant evidential material made available before the court may exercise discretion.

Four factors must be taken into account in deciding whether to grant an extension of time to file a notice of appeal and these four factors may compendiously be stated in these terms:

(a) the length of the delay;

(b) what are the reasons for the delay;

(c) what are the chances of the appeal succeeding in the event time for appealing is extended; and

(d) the degree of prejudice that the opposite party may experience if the application is granted.

There are passages in the judgment of Choor Singh J in the case of *Tan Chai Heng v. Yeo Seng Choon* [1981] 1 MLJ 271, 272 that merit reproduction and they are as follows:

> There are numerous reported decisions, both here and in England dealing with the point in issue in this case. The cases show that the court has a discretion in the matter which must be exercised judicially after considering all the circumstances of the case. They also show that for an application to extend time to succeed there must be circumstances which warrant the exercise of the court's discretion in favour of the applicant. There is also a long line of cases which show further that a mistake or oversight on the part of the applicant's solicitor or on the part of the solicitor's clerk is not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum or petition of appeal. There is very strong support for this view in *Ratnam v. Cumarasamy* [1965] 1 MLJ 228; [1964] 3 All ER 933 where Lord Guest in delivering the judgment of the Privy Council, observed at page 229:
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> > The Rules of court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.

> In this case the only material before me was the affidavit of the appellant's solicitor. The ground there stated was that the solicitor's file was mislaid. That, as stated earlier, did not prevent the solicitor from filing a notice of appeal. In my judgment, the facts disclosed gross negligence on the part of the appellant's solicitor and did not merit the exercise of judicial discretion in favour of the applicant. The application was therefore dismissed.

That brilliant judge, Edgar Joseph Jr FCJ, in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30, at p. 42 to p. 43 in style said:

> But the further hurdle which confronted the appellant and which he had to surmount was that there had been a spectacular delay of some three years before he bestirred himself into applying to the High Court to set aside the default judgment though admittedly, he had not taken any fresh step after becoming aware of the irregularity.
>
> Nevertheless, it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:
>
> (a) no one has suffered prejudice by reason of the defendant's delay;
>
> (b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or
>
> (c) to let the judgment to stand would constitute oppression. (See *Atwood v Chichester* [1878] 3 QBD 722; *Harley v. Samson* [1914] 30 TLR 450.)
>
> We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time, if the particular circumstances of the case require the intervention of the court. (See *Beale v. McGregor* [1886] 2 TLR 311.)
>
> By way of explanation for his delay in making his application to set aside the default judgment, the appellant had put forward the improbable explanation, which the judge had no hesitation in dismissing as 'ludicrous', that he had allowed judgment in default to go against him because he could not afford to engage solicitors. Having regard to his business status and experience, we agreed with the judge that this was a 'ludicrous' explanation, and was therefore unacceptable. But, delay alone, having regard to the circumstances of the present case, was not necessarily fatal to the appellant's case.

and it was said in the context of the discretion vested in the court to set aside an irregular judgment despite long delay. Here, in the present case before me, the judgment was regularly obtained. On 15 July 1998, the SAR dismissed encl. 21 with costs and that enclosure dealt with the joint application of both the second and the third defendants for stay and setting aside the judgment in default. By way of recapitulation, it would be ideal to state that on

29 November 1997 the plaintiff successfully obtained default judgments against the second and third defendants. That default judgments were served on the second and third defendants on 13 January 1998. The default judgments were based on the writ of summons which was served on 15 November 1997 by way of substituted service – posting and advertisement in the STAR newspaper, and I must say, and it was my judgment, that the default judgments were regularly obtained. It was apparent that both encls. 29 and 36 were related to encl. 21. That this court has the full and unfettered discretion to grant leave can never be doubted. In *C Paul D'Cruz v. Chow Tai Yow & Sons Sdn Bhd* [1998] 4 CLJ Supp 389, at p. 392 to p. 393, the court there said as follows:

> It is now trite that a judgment in default is a judgment given to the plaintiff, like the respondent here, without the court hearing the merits of the plaintiff's case. The court certainly has the absolute discretion to set aside the judgment on the application of the defendant, like the appellant here. *Sockalingam Chettiar & Ors v. Somasundaram Chettiar* [1941] MLJ 103 CA lays down the proposition that a person should have notice of the proceedings against him and that even when an order for substituted service has been made a judgment can still be set aside when merits are disclosed and when the court was satisfied that the defendant was not aware of the proceedings and was not avoiding service which was tantamount to knowledge of the proceedings. But the application to set aside must be made within a reasonable time and in a fit and proper case the court will certainly disregard the lapse of time (*Atwood v. Chichester* [1878] 2 QBD 722). The case of *SA Andavan v. Registrar of Titles, Negeri Sembilan & Ors* [1977] 2 MLJ 220 lays down a very wide proposition of law and it may be stated as follows: that the court may discharge an irregular order without an application being made for that purpose. Factually these two authorities are different from the present appeal. In the present appeal, the appellant who was the defendant in the magistrate's court failed to attend court on the date of the hearing and his counsel too was absent. In the present appeal, the appellant filed an application to set aside the default judgment but was unsuccessful. These two salient features in the present appeal put the appellant's case on a different pedestal than the two authorities just cited. Lord Denning MR in *Barnes v. Kondel* [1971] 1 Lloyd's Rep 544 sought to define the meaning of the phrase 'defence on the merits' in a simpler form. His Lordship said that that phrase must necessarily mean a defence which discloses an arguable and triable issue. As I said the court has an absolute discretion to set aside a judgment in default and as a general rule the court will not exercise that discretion unless the defendant can establish one out of the two salient requirements that:
>
> (i) the judgment obtained was irregular meaning that the rules of procedure has not been dutifully followed; or
>
> (ii) the defendant has a defence on the merits to the plaintiff's case.

In *Rechik Kadir & Anor v. Mohamed Shah Senusi* [1977] 1 CLJ Supp 508 at p. 516 to p. 518, the court at length went into the subject matter of an enlargement of time and this was what the court said:

> It is a correct statement of the law to say that the time frame formulated in the RHC must be strictly adhered to. But the parties may by consent in writing, agree to extend the period within which, a pleading or other document has to be served or filed or amended without an order of the Court as reflected in O. 3 r. 5(3) of the RHC. It is obvious that the plaintiffs here are not too happy with the way the defendant conducted his case in the light of the strict provisions of the RHC. On a lighter vein, I am reminded of the observations of Suffian LP in the case of *Tan Chwee Geok & Anor. v. Khaw Yen-Yen & Anor*. [1975] 2 MLJ 188 FC where his Lordship observed:
>
> > The Rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice.
> >
> > In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of Court, so strict were they about technicalities.
> >
> > But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.
>
> This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear* [1907] 1 KB 1, 4:
>
> > Although a civil Court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the Court ought not be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.
> >
> > Today O. 70 r. 1 of our Rules explicitly states that non-compliance with our Rules – 'shall not render any proceedings void unless the Court or a Judge shall so direct … .
>
> The Courts have the inherent powers to extend time under O. 92 r. 4 of the RHC for the sole purpose of preventing injustice. Even the Court of Appeal in *Keymer v. Reddy* [1912] 1 KB 215 took a bolder stand and have taken the view that the Court has the inherent jurisdiction to extend time in interlocutory proceedings independent of the rules of the Court. The time has come for me to say that an extension or abridgment of time relates to the time prescribed under the RHC and not in relation to time as prescribed under any written law. On the question of an unfettered discretion of the Court to extend time reference may also be made to the case of *Ong Guan Teck & Ors v. Hijjas*

[1982] 1 MLJ 105 where Hashim Yeop Sani J (as he then was) had this to say:

> The Court has an unfettered discretion to grant or refuse an extension of time. The rules of Court must *prima facie* be obeyed and in order to justify an extension of time, there must be some material on which the Court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules of limitation of period. In considering whether to grant or refuse extension of time the length of time that has lapsed is always a material factor to be considered by the Court exercising the discretion. On the facts of the present case there was not any valid ground for the delay and therefore application for extension of time must be refused.

The Court in *Lloyd Triestina Societa v. Chocolate Products (M) Sdn Bhd* [1978] 2 MLJ 27 FC refused to exercise its discretion to allow the extension of time to renew the writ when the applicant had not given any reason why the writ was not served during the period of its validity. The Court of Appeal in *Revici v. Prentice Hall Incorporated* [1969] 1 WLR 157 held the strict view that the rules must be obeyed and if *prima facie* no excuse was offered, no indulgence would be given. The mere fact that the extension will cause no injustice to the other party and can be compensated by cost was said not to be a sufficient reason.

Here the length of time was extremely long:

(1) it took the defendant eight solid days before filing the memorandum of appearance; and

(2) it took the defendant three (3) long lingering months before filing the statement of defence.

the affidavits of the defendant, Ng and Gwee were filed on 25 April 1994 even though the last dates for filing and serving those affidavits were on 13 October 1993 (within 14 days from 29 September 1993, those affidavits should be filed and served: Order 32 rule 13(2) of the RHC). There was thus a delay of 6 months 12 days before those affidavits were filed. There was nothing on record to show that those affidavits were served on the plaintiffs yet the defendant through encl. 24 dated 19 September 1995 (though it was wrongly worded) by way of a "Notis Cadangan Untuk Menggunakan Affidavit" gave notice to the plaintiffs that they were going to rely on those affidavits in support of their application in encl. 26. Enclosure 24 seems to be the only piece of evidence to show, at least, that those affidavits were brought to the attention of the plaintiffs but unfortunately there was nothing to show that a copy of encl. 24 was served to the plaintiffs.

The defendant advanced several reasons in support of the enlargement or abridgment of time and for fear of repetition they were:

(1) the defendant's solicitor needed instructions to file the statement of defence and those other affidavits;

(2) the defendant had to locate and hand over the relevant documents to the defendant's counsel in Kuala Lumpur.

(3) Illness of the defendant and his inability to travel to see his solicitor in Kuala Lumpur; and

(4) Inability to locate the two witnesses – Ng and Gwee for their affidavits to be prepared.

In my judgment, these reasons cannot outweigh the delays in filing the statement of defence and those affidavits mentioned earlier.

Lord Denning MR in *Revici v. Prentice Hall Incorporated And Others* [1969] 1 All ER 772 at 774 succinctly said:

> Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not. (I should imagine it was considered). Moreover (and this is important), not a single ground or excuse is put forward to explain the delay and why he did not appeal. The plaintiff had 3½ months in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time any more.

and as we are about to enter the next millennium time must be of essence and time should be kept by all and sundry. In *Dato Wong Gek Meng v. Pathmanathan Mylvaganam & Ors* [1998] 5 MLJ 560, 566, I categorically stated as follows:

> In my judgment, strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, hopefully, a speedy and efficient administration of justice. Objections to technicalities must be viewed *prima facie* as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old-fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration of justice would be curtailed if the rules embodied in the RHC are not religiously followed. With the advent of the Multimedia Super Corridor, lawyers cannot afford to adopt a lackadaisical attitude nor can they wring their hands and say that the courts would show mercy to them. As a code of procedure, the RHC should be strictly followed to the letter.

In *Cheviot Industries (Malaysia) Sdn Bhd v. Lean. Hup. Brothers Co. (Sued as a firm)* [1989] 1 CLJ 909, 910, Siti Norma Yaakob J (now JCA) said:

> In *Tan Chai Heng v. Yeo Seng Choon* [1981] 1 MLJ 271, it was held that in an application for an extension of time, there must be circumstances which include instances which warrant the exercise of the Court's discretion in favour of the application.
>
> In *Cheah Teong Tat v. Ho Gee Seng & Ors.* [1974] 1 MLJ 31, it was held that such circumstances include 'instances where the applicant has been misled by the other side or where some mistake has been made in the registry itself and he has been misled by an officer of the Court or where delay in filing notice has been caused by unforeseen circumstances like sudden death or inevitable accident or sudden serious illness or something of that kind which reasonably account for the delay. Under any of these circumstances, extension of time may be allowed'.

In *Yogananthy AS Thambaiya v. Idris Osman* [1997] 5 CLJ 705, 711, I expressly said:

> I must at once put a caveat that the Court's power to extend time, if there was an application of that nature which unfortunately there wasn't any, can never be used as 'an easy escape route for those who did not conduct their client's cases with reasonable expedition' (per May LJ in *Smith v. Secretary of State for the Environment* (reported in the Times, 6 July 1987). With reasonable diligence the plaintiff could have prepared encl. 19 expeditiously through her solicitors and avoid the pitfalls of O. 32 r. 13(2)(b) of the RHC.

With these principles in the forefront of my mind, I will now proceed to the heart of the matter. In the application to set aside the default judgment before the SAR as reflected in encl. 21, the affidavit in support at para. 5 of encl. 20 thereof gave the reasons for the delay as unintended, not deliberate and nothing was said about the lack of funds. But in para. 15 of encl. 28 which supported encl. 29 and in para. 12 of encl. 35 which supported encl. 36, the reasons for the delay were mainly confined to lack of funds. It would be correct to say that by 4 October 1996 and 31 October 1996 when the notices of demand were issued to the second and third defendants respectively, both of them already knew that the plaintiff was claiming the sum of RM316,949.23 inclusive of interest calculated till 30 September 1996 together with interest at the rate of 12% per year on the sum of RM287,113.02 from 1 October 1996 till the date of full payment, costs and any other relief which the court deemed fit, against them. Both of them too knew that the plaintiff's claim against them was grounded on the basis that they stood as guarantors. In fact, the third defendant had not only orally guaranteed the payment of the debt of the first defendant, the third defendant had gone a step further and to show, in an act of bravado, by giving additional security in the form of four

cheques. But alas, these four cheques when presented for payment by the plaintiff proved to be worthless. Cheque BHLB no: 609293 and cheque BHLB no: 609294 were returned and the reasons given were simple: payments stopped. While cheque BHLB no: 609297 was rejected with the caption: refer to drawer. Finally, for cheque BHLB no: 609298 the account was closed. The third defendant did not give up hope and he raised the issue of duress – alleging that he was forced to issue those cheques. But alas, the proposed statement of defence did not particularise the so called defence of duress. In *Malaysian French Bank Bhd v. Abdullah Mohd Yusof & Ors* [1991] 2 MLJ 475, the court refused to entertain the defence of undue influence as no particulars were set out in the affidavits. The court there was also of the view, rightly so, that a mere allegation was not sufficient to raise a defence of undue influence. The scenario would be the same here. Mere allegation of duress without proof, and without particulars must be ignored outright. At common law and also at equity it has been said that a party cannot be held to a contract unless he is a free agent. Legal duress means actual violence or threats of violence to the person. Put differently, it means threats calculated to produce fear of loss of life or bodily harm (*Friedeberg-Seely v. Klass* [1957] Times 19 February, 101 Sol Jo 275). It is very difficult to conceive a situation where a contract is procured by actual violence or a threat of violence. *Cf Ware and De Freville Ltd v. Motor Trade Association* [1921] 3 KB 40 laid down the principle of law to the effect that the threat must be illegal; it must be a threat to commit a crime or a tort. As a ground of relief, duress must be confined to the duress of the person and not to his goods (*Atlee v. Backhouse* [1838] 3 M & W 633 at 650, per Parke B.). In the Malaysian context, s. 15 of the Contracts Act 1950 enacts as follows:

> 'Coercion' is the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.
>
> *Explanation* – It is immaterial whether the Penal Code is or is not in force in the place where the coercion is employed.
>
> *ILLUSTRATION*
>
> A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Penal Code.
>
> A afterwards sues B for breach of contract at Taiping.
>
> A has employed coercion, although this act is not an offence by the law of England, and although section 506 of the Penal Code was not in force at the time when or place where the act was done.

The case of *Perlis Plantations Bhd v. Mohammad Abdullah Ang* [1988] 1 CLJ 670 gave a restricted meaning to s. 15 of the Contracts Act 1950. The court there held that the English common law of "economic coercion" was not applicable in the light of the express provisions in the Contracts Act 1950. At p. 676 of the report, the learned judge, VC George J (as he then was) said:

> ….. our Contract (sic) Act does not provide for any form of coercion other than as defined by section 15.

and he proceeded to observe at p. 677 of the report that there was "in any event" no coercion exercised, economic or otherwise. Ian Chin J in *Teck Guan Trading Sdn Bhd v. Hydrotek Engineering (S) Sdn Bhd* [1996] 4 MLJ 331, [1996] 1 BLJ 163 after construing narrowly s. 15 of the Contracts Act 1950 proceeded to consider the doctrine of economic duress and held that, in any event, there was no duress on the facts of the case. James Foong J in *Mohd Fariq Subramaniam v. Naza Motor Trading Sdn Bhd* [1997] 3 CLJ Supp 249 considered the doctrine of economic duress without reference to s. 15 of the Contracts Act 1950 at all. In *Chin Nam Bee Development Sdn Bhd v. Tai Kim Choo* [1988] 2 MLJ 117, the court was faced with the question of whether the concept of "coercion" in s. 73 of the Contracts Act 1950 was the same as the concept of "coercion" in s. 15 of the Contracts Act 1950. Eusoff Chin J (now Chief Justice of the Federal Court) held at p. 119 of the report:

> It would be difficult to give effect to section 73 illustration (b) if the word 'coercion' is to be given the meaning as defined in section 15 of the Act. They appear to be in conflict with each other. Therefore the word 'coercion' in the context of section 73 of the Act should be given its ordinary and general meaning since there is nothing under section 15 which says that the word 'coercion' should apply throughout the Act. The definition of 'coercion' in section 15 should only apply for the purpose contained in section 14, as section 14 of the Act specifically says so.

and, indeed, the reasoning of his Lordship are flawless as illustrations are part and parcel of the Contracts Act 1950 and should be given due consideration.

What is economic duress? It relates to inequality of bargaining power. Lord Denning MR in *Lloyds Bank Ltd v. Bundy* [1975] QB 326 at 339, [1974] 3 All ER 757 at 765 gave a bird's eye view of the law in these words:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own

> ignorance or infirmity, coupled with undue influence or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is served by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases.

and clearly Lord Denning was suggesting two doctrines:

(1) economic duress; and

(2) inequality of bargaining power.

Lord Scarman in *Pao On v. Lau Yiu Long* [1979] 3 All ER 65 at 79, [1979] 3 WLR 435 at 451 suggested that "there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must always amount to a coercion of will, which vitiates consent."

It is indeed unfortunate that economic duress was not pleaded nor particularised and so there was no necessity to consider this interesting doctrine to the factual matrix of the present case. Be that as it may, it was my judgment that there was no duress at all in the present case. There was no actual violence or a threat of violence exerted upon the third defendant by the plaintiff. There was also no threat calculated to produce fear of loss of life or bodily harm to the third defendant. The defence of duress was merely raised to hoodwink this court and if that was the purpose it must surely be frowned upon.

Not to be outwitted, the second defendant raised the issue that he had resigned as the managing director of the first defendant and, consequently, he had nothing to do with the debt of the first defendant. Now, I must at once say that there has never been a requirement in law that a person who provides a guarantee for a company must be a director of that particular company. Any guarantee should be treated reasonably after taking the surrounding circumstances into consideration (*Lloyd v. Harper* [1880] 16 Ch D 290; *Oriental Bank of Malaya Ltd v. N. Subramaniam* [1958] MLJ 35; and *Yang Chin Lang v. Tan Chong & Sons Motor Co Ltd* [1968] 2 MLJ 8). Section 79 of the Contracts Act 1950 enacts as follows:

a A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety' ; the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

b Section 80 of the Contracts Act 1950 speaks of the consideration for guarantee in these words:

Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

c *ILLUSTRATIONS*

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods, C promises to guarantee the payment in consideration of A's promise to
d deliver the goods. This is a sufficient consideration for C's promise.

(d) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

e (e) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

In the commercial world, guarantees play a major part as it enhances the creditworthiness of the borrowers. Guarantees provided by directors of a
f company are manifestations of confidence in the business generated by the company. In simple language, a guarantee is a legally enforceable promise whereby the guarantor who is commonly known as the surety undertakes to answer to the creditor for the present or future liability of a third party – known as the debtor, in the event of a default by the debtor. A guarantee is
g a contract and it imposes a secondary or contingent liability on the guarantor. That liability is triggered once the debtor defaulted and is unable to meet the obligations under the terms of the arrangement entered between the debtor and the creditor. The existence of the guarantee is always dependent on the validity of the obligations arising from the principal contract to which it relates and if the principal contract is void at law, then the guarantor will be released
h from his obligations under the guarantee. The existence and the extent of the liability of the guarantor may vary from case to case and usually it is dependent on the construction to be attached to the guarantee document.

i

Guarantees come in various forms: joint and/or several where there is more than one guarantor, specific or continuing, conditional or on demand. The case of *White & Anor v. Tyndall & Ors* [1888] 13 App Cas 263 lays down a sound principle of law. It states that where there is more than one guarantor, and where there is no express words to make it several or joint and several, the guarantee will assume the character of a joint obligation. Thus, all co-guarantors who provide joint guarantees are liable collectively for the entire amount and they must certainly be sued together in one go subject, of course, to the doctrine of survivorship as set out in s. 84 of the Contracts Act 1950 which enacts that the death of a surety or a guarantor acts as a revocation of a continuing guarantee in so far as it relates to future transactions unless there is a contract to the contrary. In the event one of the co-guarantors dies, the existing liability must be carried and shouldered equally by the remaining surviving guarantors as no claim may be brought against the estate of the deceased co-guarantor. It must not be forgotten and it is the law in this country that the doctrine of survivorship is subject to certain statutory exceptions enumerated in the Partnership Act 1961 (Revised 1974) and the Bills of Exchange Act 1949 (Revised 1978) as these Acts allow for liability to continue to the estates of the deceased persons. The case of *Kendall v. Hamilton* [1879] 4 App Cas 504, taken in the context of a banker's perspective, gives much leeway to joint guarantors and there it says that a release given to any one of the joint guarantors will cause the others to be released from their obligations irrespective of whether the liability has been satisfied in full and separately from the fact that the bank might not be aware of the existence of any particular guarantor. Our Parliament was not happy with the ramifications of *Kendall v. Hamilton (supra)*, and they acted expeditiously much to the delight of the banking industry in Malaysia. Parliament worded s. 91 of the Contracts Act 1950 to circumvent *Kendall v. Hamilton (supra)*. Since then our banks have not been merciful. The partial recovery of the debt due from one guarantor will not prevent the creditor from seeking the balance from the other guarantors (*Blyth v. Fladgate* [1891] 1 Ch 337). In a joint and several guarantees, the creditor is placed in an enviable position since it can decide as to which of the co-guarantors it wishes to sue for the recovery of the debt; obviously this is based upon the perceived notion on the ability of a particular guarantor to pay up the debt. The creditor too is also at liberty to pursue the matter further by going after the other guarantors if the debt is not fully paid up. A word of caution should be registered. Even though the creditor is free to sue each and any of the co-guarantors separately, the creditor cannot recover an amount far exceeding the debt.

Specific guarantees, on the other hand, limit the potential liability of the guarantor in terms of quantum in the sense that it cannot exceed the debt.

This brings me to the concept of continuing guarantee and it is defined in s. 82 of the Contracts Act 1950 as:

> A guarantee which extends to a series of transactions is called a 'continuing guarantee'.

and by its very nature, a continuing guarantee continues and extends to a series of transactions.

The liability under a conditional guarantee arises upon compliance with a condition precedent. To put it differently, the obligation of the guarantor under a conditional guarantee arises upon the occurrence of a stipulated condition.

Being guarantors, the second and third defendants must be held accountable for the debt of the first defendant. This case was purely a case of a transaction between businessmen. Bowen LJ once said in *Miles v. New Zealand Alford Estate Co* [1886] 32 Ch D 266, 291:

> We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between businessmen.

Both the second and the third defendants deposed that they were educated in Chinese schools and they did not read English newspapers particularly the STAR and for these reasons they said that they had no knowledge of the advertisement in regard to the service of the writ of summons by way of a substituted service. A perusal of the relevant file showed this alarming set of facts. Lim deposed an affidavit in encl. 23 to oppose the application of both the second and third defendants in encl. 21 for stay and setting aside the judgment in default. Enclosure 23 contained some documents marked B and these documents were in relation to the goods ordered by the first defendant from the plaintiff. These documents were in the English language and arising from the delivery of those goods that the second and third defendants stood as guarantors. If the second and third defendants could not understand the documents written in the English language in exh. B of encl. 23, why were they willing to stand as guarantors. The four cheques issued by the third defendant too were written in the English language and how could this be done if the third defendant could not read the English language. The conclusion was irresistible. Both the second and the third defendants were conversant in the English language and they could read as well as write the language.

Incidentally, the affidavit in support of encl. 21 deposed by both the second and the third defendants was silent in regard to their knowledge of the English language.

In my judgment, there was "no relevant evidential material" laid before me to exercise my discretion in favour of the second and the third defendants. I had no choice but to dismiss encls. 29 and 36 with costs.